

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THERESA BENJAMIN	:	ORDER
	:	DTA NO. 817433
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1993, 1994 and 1995.	:	

Petitioner, Theresa Benjamin, c/o 38 Parrish Park, East Stroudsburg, Pennsylvania 18301, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1993, 1994 and 1995. A hearing on the petition was scheduled before Presiding Officer Allen Caplowaith on June 20, 2001. Petitioner did not appear at the hearing. On July 19, 2001, Presiding Officer Caplowaith issued a default determination denying the petition.

On August 3, 2001, petitioner, appearing *pro se*, filed a request that the July 19, 2001 default determination be vacated. The Division of Taxation, appearing by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel), filed a response in opposition to petitioner's request on August 8, 2001.

Based upon the record and pleadings filed in this matter, Andrew F. Marchese, Chief Administrative Law Judge, issues the following order.

FINDINGS OF FACT

1. Petitioner originally filed New York State nonresident and part-year resident returns for the years 1993, 1994 and 1995. In these returns, petitioner allocated 100% of her wages as an employee of the City of New York to New York State. Subsequently, petitioner filed amended resident income tax returns alleging that her wages were not subject to tax and claiming refunds for each of the three years at issue. Petitioner received a Notice of Disallowance of her refund claim. Petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services. However, on September 17, 1999, the Bureau of Conciliation and Mediation Services sustained the Notice of Disallowance.

2. On November 29, 1999, petitioner filed a petition challenging the Notice of Disallowance of her claim for refund with respect to her personal income tax under Article 22 of the Tax Law for the years 1993, 1994 and 1995. Her petition states, in relevant part, that petitioner is a nonresident alien who has no taxable income and no tax liability. The petition goes on to state that compensation for labor and the exercise of the right to labor are property and are not taxable.

3. A small claims hearing in this matter was scheduled for March 22, 2001, but was adjourned at petitioner's request. The hearing was then scheduled for June 20, 2001 at the offices of the Division of Tax Appeals in New York City. On May 14, 2001, a final notice of small claims hearing was sent to petitioner by the calendar clerk of the Division of Tax Appeals advising her of her June 20, 2001 hearing date.

4. On June 20, 2001, Presiding Officer Allen Caplowaith called the ***Matter of Theresa Benjamin*** for hearing. Petitioner did not appear at the hearing. No written request for an adjournment of the hearing or other communication was received from petitioner. On July 19,

2001, Presiding Officer Caplowaith issued a default determination denying the petition of Theresa Benjamin.

5. On August 3, 2001, petitioner filed a request to vacate the default determination. The request indicates without elaboration that petitioner is still awaiting important documentation regarding her tax inquiries. The request does not address the reasons for petitioner's failure to appear for her hearing or the merits of petitioner's case.

6. In its response, the Division of Taxation points out that petitioner has shown neither an excuse for her default nor a meritorious case. The Division of Taxation also cites to the numerous Federal cases which have rejected the argument that wages are not income and which have found, in addition, that cases espousing such argument are frivolous.

CONCLUSIONS OF LAW

A. Section 3000.13(d)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.13[d][2]) provides: "[i]n the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear."

Section 3000.13(d)(3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.13[d][3]) provides: "[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case."

B. There is no doubt on the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*,

Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that she has a meritorious case (20 NYCRR 3000.13[d][3]; *see also*, *Matter of Zavalla, supra*; *Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner has not established a reason for her failure to appear at the hearing. The fact that she is awaiting some important documentation regarding her tax inquiries does not excuse her failure to appear. Petitioner never asked for or received an adjournment of her June 20, 2001 hearing. Accordingly, I must conclude that petitioner has not established reasonable cause for her failure to appear at her hearing.

D. Petitioner has made no assertions whatsoever in her request to vacate the default regarding the merits of her case. However, in her petition, petitioner alleges that the wages that she earned as an employee of the City of New York are not taxable in New York because compensation for labor is not subject to tax.

E. A taxpayer's New York adjusted gross income is equal to the taxpayer's Federal adjusted gross income with various modifications not relevant to the case at hand (Tax Law § 612). The argument that wages are not included in taxable income has been litigated extensively at the Federal level. The Federal courts have repeatedly and unanimously rejected this argument and found it to be utterly frivolous (*see, e.g., United States v. Connor*, 898 F2d 942 [3rd Cir 1990]; *Coleman v. Commissioner*, 791 F2d 68 [7th Cir 1986]). Moreover, New York State follows this Federal precedent (*see, Matter of Thomas*, Tax Appeals Tribunal, April 19, 2001).

Accordingly, I find that petitioner has failed to demonstrate a meritorious case and has in fact presented only frivolous arguments.

F. The request of Theresa Benjamin to vacate the default determination issued July 19, 2001 is denied.

DATED: Troy, New York
September 13, 2001

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE